

minimum wage to “each of his employees who is engaged in commerce or in the production of goods for commerce.” It thus becomes primarily an individual matter as to the nature of the employment of the particular employee. Some employers in a given industry may have no employees covered by the Act; other employers in the industry may have some employees covered by the Act, and not others; still other employers in the industry may have all their employees within the Act’s coverage. If, after considering all relevant factors, employees are found to be engaged in covered work, their employer cannot avoid his obligations to them under the Act on the ground that he is not “engaged in commerce or in the production of goods for commerce.” To the extent that his employees are so engaged, he is himself so engaged.⁹

(b) In determining whether an individual employee is within the coverage of the wage and hours provisions, however, the relationship of an employer’s business to commerce or to the production of goods for commerce may sometimes be an important indication of the character of the employee’s work.¹⁰ It is apparent, too, from the 1949 amendment to the definition of “produced” and its legislative history that an examination of the character of the employer’s business will in some borderline situations be necessary in determining whether the employees’ occupation bears the requisite close relationship to production for commerce.¹¹

§ 776.3 Persons engaging in both covered and noncovered activities.

The Act applies to employees “engaged in commerce or in the production of goods for commerce” without

regard to whether such employees, or their employer, are also engaged in other activities which would not bring them within the coverage of the Act. The Act makes no distinction as to the percentage, volume, or amount of activities of either employee or employer which constitute engaging in commerce or in the production of goods for commerce. Sections 6 and 7 refer to “each” and “any” employee so engaged, and section 15(a)(1) prohibits the introduction into the channels of interstate or foreign commerce of “any” goods in the production of which “any” employee was employed in violation of section 6 or section 7. Although employees doing work in connection with mere isolated, sporadic, or occasional shipments in commerce of insubstantial amounts of goods will not be considered covered by virtue of that fact alone, the law is settled that every employee whose engagement in activities in commerce or in the production of goods for commerce, even though small in amount, is regular and recurring, is covered by the Act.¹² This does not, however, necessarily mean that an employee who at some particular time may engage in work which brings him within the coverage of the Act is, by reason of that fact, thereafter indefinitely entitled to its benefits.

§ 776.4 Workweek standard.

(a) The workweek is to be taken as the standard in determining the applicability of the Act.¹³ Thus, if in any workweek an employee is engaged in both covered and noncovered work he is entitled to both the wage and hours

⁹ *Kirschbaum v. Walling*, 316 U.S. 517. See also *Walling v. Jacksonville Paper Co.*, 317 U.S. 564; *McLeod v. Threlkeld*, 319 U.S. 491; *Mabee v. White Plains Pub. Co.*, 327 U.S. 178.

¹⁰ *Borden Co. v. Borella*, 325 U.S. 679; *10 E. 40th St. Bldg. Co. v. Callus*, 325 U.S. 578; *Armour & Co. v. Wantock*, 323 U.S. 126; *Donovan v. Shell Oil Co.*, 168 F. 2d 229 (C.A. 4); *Hertz Driveurself Stations v. United States*, 150 F. 2d 923 (C.A. 8); *Horton v. Wilson & Co.*, 223 N.C. 71, 25 S.E. 2d 437.

¹¹ H. Mgrs. St., 1949, pp. 14, 15; Sen. St. 1949 Cong. Rec. 15372.

¹² *United States v. Darby*, 312 U.S. 100; *Mabee v. White Plains Pub. Co.*, 327 U.S. 178; *Schmidt v. Peoples Telephone Union of Maryville, Missouri*, 138 F. 2d 13 (C.A. 8); *New Mexico Public Service Co. v. Engel*, 145 F. 2d 636 (C.A. 10); *Sun Pub. Co. v. Walling*, 140 F. 2d 445 (C.A. 6), certiorari denied 322 U.S. 728; *Davis v. Goodman Lumber Co.*, 133 F. 2d 52 (C.A. 4).

¹³ See *Gordon’s Transports v. Walling*, 162 F. 2d 203 (C.A. 6), certiorari denied 332 U.S. 774; *Walling v. Fox-Pelletier Detective Agency*, 4 W.H. Cases 452 (W.D. Tenn.), 8 Labor Cases 62,219; *Walling v. Black Diamond Coal Mining Co.*, 59 F. Supp. 348 (W.D. Ky.); *Fleming v. Knox*, 42 F. Supp. 948 (S.D. Ga.); *Roberg v. Henry Phipps Estate*, 156 F. 2d 958 (C.A. 2). For a definition of the workweek, see § 778.2(c) of this chapter.